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COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

D.T.E. 00-47A

… separate investigation limited to the question of whether the Compact, as a municipal aggregator, should be allowed access to Commonwealth Electric Company's bill envelope for the purpose of customer rights notification pursuant to G.L. c. 164, ss 134(a).

Initial Comments of Cape and Islands Self-Reliance Corporation, August 31, 2000

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DTE 00-47A Petition of Cape Light Compact Et Al. For Approval of Aggregation Plan

The issue of consumer access to utility bill envelopes was not prevented in the Supreme Court's decision in Pacific Gas & Electric Company v. Public Utilities Commission of California, 475 U.S. 1, 106 S. Ct. 903 (1986). Under that decision there are several opportunities that would give the Cape Light Compact, a non-profit organization that is dedicated to the public good, the ability to use the utility bill space to save money and inform the people it serves. This paper will discuss the opportunities that the Supreme Court's decision did not preclude.

The Cape and Islands Self-Reliance has researched this subject and turned up the following details that we believe should be considered before DTE makes a decision:

Utility bills are mailed first class, presorted for $.23 which allows one ounce of weight per envelope. The components of the mailing -- the mailing envelope, the bill and the return envelope -- weigh about one half ounce. Therefore, more paper can be included in the envelope without incurring additional cost. This remaining space is typically used by the utilities in Massachusetts to promote their own ideas through newsletters as well as DTE mandated material.

The expense of mailing the bills is borne by the ratepayers and it is part of the rate base. Should ratepayers have a say in who and how the "empty space" is used? Should the empty space be used for the public good? Should ratepayers be reimbursed for the empty space beyond the utility's bill, return envelope and mail envelope if they clearly have no say in who and how the empty space is used?

The concept of ratepayer recovery of the empty space in utility bills was used in the early 1980's by Ralph Nader and TURN, an intervenor group, to help establish Citizens Utility Boards (CUBs) in California and several other states. Nader and TURN asked why not allow the new CUBs to include their membership applications in the utility bills. TURN argued that PG&E's customers should not "bear the expense" of the company's political speech.

The California Public Utility Commission (PUC) allowed the concept and CUBs grew to have memberships in southern California in the tens of thousands in a relatively short time. In their decision, the PUC stated, "Envelope and postage costs and any other costs of mailing bills are a necessary part of providing utility service to the customer. However, due to the nature of postal rates extra space exists in these billing envelopes. Mindful that the extra space is an artifact generated with ratepayer funds, and is not an intended or necessary item of rate base, and that the only alternative treatment would unjustly enrich PG&E and simultaneously deprive the ratepayers of the value of that space, we concluded that the extra space in the billing envelope is properly considered as ratepayer property."

To allow a fairer use of the extra space, the PUC ordered PG&E to give TURN the space usually taken up by their newsletter four times a year to raise funds and to communicate with ratepayers without limitation except to state that TURN's message was not that of PG&E's.

Subsequently, Pacific Gas and Electric, a California utility appealed all the way to the U.S. Supreme Court which decided in the utility's favor by a majority of one. In a 1986 ruling, the Supreme Court stated that CUB literature in a utility bill infringed upon the utility's freedom of speech rights as defined by the first amendment. The Supreme Court argued that PG&E had a First Amendment right "not to help spread a message with which it disagrees." Justices Renquist, Stevens and White dissented and Justice Blackmun did not participate.

The Supreme Court never challenged the concept of ratepayer ownership of the bill. Justice Marshall stated, "nothing in this opinion nor, as I understand it, the plurality's opinion, addresses the issue whether the State may exclude the cost of

the mailing Progress [the utility's newsletter] from the appellant's rate base. Indeed, the appellant [the utility] concedes that the State may force the shareholders to bear those costs."

It is important to understand that the California PUC, in their extreme implementation of their findings referenced above, was trying to promote fair and effective utility regulation by encouraging participation by intervenors. In its negative decision, the Supreme Court ruled that encouraging a "variety of views" could have been done without infringing on PG&E's First Amendment rights and that the PUC's views were, "Not narrowly tailored means of furthering that interest." The Supreme Court also stated that substituting PG&E's newsletter with TURN's piece, "was not justifiable as a permissible time, place or manner regulation of speech as the order was not content neutral."

As to the question of who owns the empty space the Supreme Court stated, "The Commission [PUC] expressly declined to hold that under California law the appellant's [PG&E's] customers own the entire billing envelope and everything contained therein. It decided only that the ratepayers own the "extra space" in the envelope, defined as that space left over after including the bill and required notices, up to a weight of one ounce. The envelopes themselves, the bills, and Progress all remain appellant's property. The Commission's access order thus clearly requires the appellant to use its property as a vehicle for spreading a message with which it disagrees." Our interpretation of this is that the utility's property in the form of the envelope is being used to carry the negative message from the CUB though the empty space belongs to the ratepayer. The problem is avoided if the message is content neutral.

In light of the Supreme Court's decision, we believe it is important to avoid imposing upon the utility's freedom of speech as interpreted by the Supreme Court. We believe that the Supreme Court's criteria can be met by not criticizing the utility and serving a public purpose. In the Cape Light Compact's proposed use of the empty space to inform it's members, there is no reason to criticize Commonwealth Electric. DTE can condition the use of the space upon this premise. The content inserted in the bill by the Compact must be neutral, to borrow the phrase from the Court. It could further be conditioned by requiring that the space must be used to provide useful information to customers that is critical to the implementation of the laws mandated by the Commonwealth therefore serving a, "compelling state interest".

The Maine Supreme Court confirmed the ability of the Maine Public Utilities Commission to require distribution companies to include messages in their bills (Central Maine Power Co. v. Public Utilities Commission, (Me. 1999). The Court asserted the "compelling state interest" phrase used by the U.S. Supreme Court in justifying its decision. They also rejected the option proposed by Central Maine that the PUC directly mail education materials to consumers because it would be a less effective way of reaching consumers.

The Massachusetts Restructuring Act anticipated the use of the bills to inform consumers in SECTION 193, 1B (b) where it states, "Notwithstanding the actual issuer of a ratepayer's bill, the default service provider shall be entitled to furnish a

one page insert accompanying the ratepayer's bill." In our opinion the Compact, as a municipal aggregator serves the same purpose as the "default service provider" and should be allowed to use the bill space.

In addition, the value of the empty space could be reimbursed to the Compact as the representatives of the Cape and Vineyard ratepayers. The Compact could then use the money to fund the anticipated $300,000 cost of mailing quarterly notices to ratepayers in lieu of the use of the empty space in the utility bill envelope. Based on the weight of the mailing envelope, the utility's bill and return envelope weigh about one half ounce leaving another half ounce of available space. This would be about $21,505(1) for the left over one half ounce that the ratepayers are paying for in their rates.

We believe that any extra material besides the bill (such as the utility's newsletter) and DTE mandated messages are unnecessary and should not be paid for by the ratepayer. It could be argued that the empty space has a much higher commercial value if the empty space were auctioned off to the highest bidder for advertising purposes. We believe that the public would be much better served by allowing the Compact to include its quarterly notices in the utility's envelope.

From our reading of the Supreme Court's decision, Commonwealth's concern about their property rights is misplaced.(2) The Supreme Court clearly chooses not to argue the PUC's interpretation of the ownership. PSE&G admitted that the cost of the empty space could be brought back to their stockholders.

The PUC also held that the Public Utilities Regulatory Act (PURPA), Title I, section 113 (b) (5). (D. (3887 at 471.) forbids charging customers for political and commercial advertising. Therefore, for example, the company's newsletter, "Comment" should not be charged to the ratepayer because its material could be political or commercial in nature.(3)

Subsequent to the Supreme Court's decision the PUC instituted a program where they created a card to inform ratepayers about the intervenor groups and had the utilities insert them in their bill envelopes. This was not challenged in any legal proceeding outside of the California PUC's jurisdiction. In view of the above, the DET could initiate a notice on behalf of the Compact to inform ratepayers and require that the utility insert it in the bill envelope. DET could take responsibility for the language on the statement to ensure that it met the requirements set forth by the Supreme Court.

Commonwealth believes that customer confusion could result from the Compact's use of the empty space. This can be minimized by requiring that DTE approve the Compact's insert and that it clearly spell out in large type that questions should be directed to an 800 phone number that is manned by the Compact. If the notice release is timed to coordinate with the Compact's education program, consumer confusion can be

further minimized. It is important that people get the change over and opt-out information to avoid an even more confusing situation. Confusion over that process may initiate more telephone calls to Commonwealth than could possibly occur with a well designed bill insert.

In the final analysis, it is much more efficient to use Commonwealth's mailing for several reasons. Commonwealth has the most up-to-date list available so the greatest percentage of people in the Compact's area will be notified of the change. The municipal lists available to the towns are going to be a direct match with electric utility customers. For example, renters are not always included in tax rolls or water bills. Landlords receive the tax bill or water bill and, often times, they reside out of town. How will the towns ensure that renters are mailed a notification? The Compact is obligated by the Massachusetts Restructuring Act to notify all their customers of the change over and the customer's ability to opt-out.

Using the bill space is the most cost-effective and sure way of reaching 187,000 consumers who are paying the cost of the mailing anyway. Why burden consumers with an additional cost? The Compact will have to go to taxpayer funds to meet the added expense of the mailing costs.

September 1, 2000 Respectfully Submitted,

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1. 1 We assumed that bulk rate mailing of one ounce costs $0.23 so the value of one half ounce is $0.115. We multiplied .115 times the 187,000 customers in the Compact's area. This equates to $21,505.00.

2. 1 DTE 00-47, p. 2, "The Company argues that because its property rights are specifically at issue, the Department should adjudicate this issue pursuant to G.L. c. 30A"

3. 2 Comments of the Division of Ratepayer Advocates on the Commission's order Instituting Investigation, I.90-10-042, Filed October 24, 1990, page 6.